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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 8

BUTTE, ANACONDA & PACIFIC RAILWAY COMPANY, petitioner

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 82) is reported in 61 F. (2d) 587. The first opinion of the District Court overruling petitioner's demurrer to the complaint (R. 10) is reported in 38 F. (2d) 871. The second opinion of the District Court sustaining the Government's demurrer to the answer to the complaint is not officially reported, but is printed in the Record at page 37.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered November 7, 1932 (R. 95). A petition for rehearing before that court was filed December 6, 1932, and was denied January 16, 1933 (R. 96). Petition for certiorari was filed in this Court on March 13, 1933, and granted April 17, 1933 (289 U.S. 717). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether Section 204, Transportation Act, 1920, in providing for payment of any carrier as therein defined "which sustained a deficit in its railway operating income" while operating its own railroad during the Federal control period, authorized payment not only of carriers which operated at an actual loss, but also those which operated at a profit, though a diminished profit, during the control period as compared with the test period.

2. Whether, if the first question is answered in the negative, the Interstate Commerce Commission's certification of a payment based upon its misconstruction of the term "deficit" was final and conclusive, and deprived the courts of jurisdiction to construe that term in an action to recover the unauthorized payment.

3. Whether recovery by the Government of money paid to petitioner upon an erroneous construction of "deficit" by the Commission may be

denied on the ground (1) that petitioner accepted the money in good faith and has since disbursed it, or (2) that the payment was a "compromise" of petitioner's claim.

STATUTE INVOLVED

Section 204, Transportation Act, 1920 (c. 91, 41 Stat. 460; U.S.C., Title 49, sec. 73, as amended March 4, 1927, c. 510, 44 Stat. 1446), is set out in the Appendix, *infra,* pp. 40–43. For convenient reference, the portions of Sections 209 and 212 of that Act and Sections 1 and 14 of the Federal Control Act, to which reference is made in the argument, are also set forth in the Appendix, *infra,* pp. 43–56.

STATEMENT

This is a suit to recover $487,116.31, paid to petitioner by the Secretary of the Treasury upon a certificate issued by the Interstate Commerce Commission upon a misconstruction of Section 204, Transportation Act, 1920.

Petitioner is a steam and electric railroad company, which, during Federal control of railroads, was engaged as a common carrier in operating between Butte and Anaconda, Montana, a line of railroad 25.3 miles in length, which connected with the Northern Pacific Railway Company, a carrier under Federal control. Petitioner's road was under Federal control from January 1, 1918, to September 27, 1918, when it was relinquished by the Director General of Railroads, acting in pursuance of

his express power under Section 14 of the Federal Control Act. From September 28, 1918, to February 29, 1920 (when Federal control terminated) petitioner itself operated the road. During the latter period, petitioner earned a profit or railway operating income of $239,525.13 (R. 3.) It filed with the Interstate Commerce Commission its claim for reimbursement of an alleged railway operating income "deficit" of $600,527.35 under Section 204.

That section provided for payments to certain carriers which, among other things, had sustained deficits in their railway operating incomes while privately operating their own roads during Federal control. Paragraph (a) described and defined the carriers entitled to reimbursement. To bring itself within the definitive language of that paragraph it was necessary for a carrier to show that it, first, engaged as a common carrier in general transportation, and, second, competed for traffic or connected with a railroad under Federal control, and third, "sustained a deficit in its railway operating income for that portion (as a whole) of the period of Federal control during which it operated its own railroad or system of transportation." If a carrier met these three requirements, it was entitled to payment, not in the amount of its control period deficit but in whatever amount resulted from computations to be made by the Commission as detailed in paragraphs (b) to (f), inclusive.

Paragraph (b) provided that railway operating income or any deficit therein for the Federal control period should be computed in a manner similar to that provided in Section 209 with respect to such income or deficit for the guaranty period, (Appendix 40), and that such income or deficit for the test period should be computed in the manner provided in Section 1 of the Federal Control Act (Appendix 40). Paragraph (g) required the Commission to certify to the Secretary of the Treasury the amounts payable to carriers which met the three definitive requirements of paragraph (a).

The Commission first ruled, on March 4, 1920, that carriers which did not sustain a railway operating deficit—that is, an actual loss, while privately operating their own roads during the control period, were not entitled to payment under Section 204, and issued an order requiring carriers to furnish, on a form prescribed by the Commission, the data necessary for its use in determining what carriers were entitled to payment and the amount thereof. (See *Construction of the Word "Deficit"*, 66 I.C.C. 765, 766; and R. 11.)

But the Commission thereafter reconsidered the meaning of the word "deficit", and, after receiving briefs from and hearing arguments of interested parties, it rendered its decision in *Construction of the Word "Deficit", supra* (February 9, 1922), in which it changed its first ruling and held that the term "deficit in its railway operating income" as

used in Section 204 meant "a deficiency in income under private operation in the Federal control period,[1] as compared with the average income for corresponding portions of the test period.[2]"

Upon that construction, the Commission determined that petitioner was entitled to $487,116.31, and on March 20, 1925, issued its certificate accordingly to the Secretary of the Treasury, who paid that amount to petitioner (R. 47–49; and 94 I.C.C. 617).

But, again, in *Deficit Status of Bingham & Garfield Ry. Co.*, 99 I.C.C. 724 (October 17, 1925), the Commission reconsidered its decision of February 9, 1922, and came to the conclusion that its ruling of March 4, 1920, was correct. It held "that the words 'deficit in its railway operating income' as used in Section 204 of the Transportation Act, 1920, mean an excess of railway operating expenses over railway operating revenues, computed as therein provided."

Inasmuch as petitioner had not sustained a loss, but had, on the contrary, operated at a profit of $239,525.13 during the control period, it was not,

[1] The term "Federal control" means the possession, use, control, and operation of railroads and systems of transportation, taken over or assumed by the President, during the period December 28, 1917, to March 1, 1920.

[2] The "test period" is the three-year period ending June 30, 1917. The railway operating incomes of carriers during that period were adopted by Congress as the basis for determining the measure of compensation to railroads which were under Federal control.

under this interpretation, a "carrier" entitled to any payment under Section 204. The Government then demanded refund of the amount previously paid to petitioner, and the demand was refused. Whereupon this suit was brought to recover, alleging that the Commission's construction of the term "deficit", upon which payment had been made, was erroneous and unwarranted, and that the true and correct meaning of the term was an actual loss from operation; that is, an excess of expenses over income. (R. 2–7.)

The District Court overruled petitioner's demurrer (R. 8), held that "deficit" meant an actual loss or "red-ink balance", and sustained its own jurisdiction to construe the statute and determine whether it authorized any payment to a carrier which made a profit while operating its line during Federal control (R. 10–17). Petitioner then answered (R. 17–33), and admitted the essential facts alleged in the complaint, but denied liability, and set up, as affirmative defenses, that, (1) because the Commission had reduced the amount of the claim, and petitioner had accepted the amount certified "in final settlement of all of its claims against the United States" under Section 204, the Government was estopped from asserting a right to recover; (2) because petitioner had accepted the amount in good faith and had expended it in payment, among other things, of dividends to stockholders, state taxes, and Federal income taxes, recovery should be

denied "in sound morals and good conscience"; and (3) because the personnel of the Commission had changed between the rendition of its two opinions construing the word "deficit", its last action was without authority. The Government then demurred (R. 34–36) to the answer. The demurrer was sustained, except as to petitioner's claim for credit or deduction of Federal income taxes paid out of the amount received. (R. 37–40.) The District Court then entered judgment for the Government. (R. 60–61.)

The Circuit Court of Appeals affirmed the judgment of the District Court in all material respects. (R. 82–94.)

SUMMARY OF ARGUMENT

I

Payments under Section 204 were not "in any sense just compensation for the taking of property", for the carriers which were to receive payments "were during the time to which the section applied in the possession and management of their owners." That section provided "partial redress" to the carriers therein defined for "consequential losses" resulting from Federal control. *Continental Tie & L. Co.* v. *United States,* 286 U.S. 290, 294. The payments were based upon "equitable and moral considerations" and not upon vested rights. See *Work* v. *Rives,* 267 U.S. 175, 181.

1. "Deficit" is an accounting term which is customarily and universally accepted to mean an excess of expenses over income, and the courts below correctly held that Congress so used it not only in the definitive provisions of paragraph (a) but throughout Section 204. No confusion arises if the term is given its normal meaning throughout the section, but if not accorded that meaning in paragraph (a), then the use of the word in the definitive provision of that paragraph must be wholly ignored in construing the section, and this is required by petitioner's construction. Its construction is also contrary to the necessary meaning of the term "deficit" as used in paragraph (f) of that section, and in Section 209. The Circuit Court of Appeals correctly held that the meaning of "deficit" as used in the definitive or "jurisdictional" provisions of paragraph (a) could not be subordinated to or enlarged by the subsequent paragraphs, which merely provide the method of computing the amounts payable to the carriers defined in paragraph (a); and that, if a carrier sustained an actual loss while operating its line during Federal control, then the amount of its payment was to be worked out by means of the calculations required to be made under the subsequent paragraphs, but that if it had not sustained such loss, then it had no right to any payment. That court's decision is correct, and is in harmony with the decision of this Court in *Continental Tie & L. Co.* v. *United States, supra.*

2. It is futile to argue that the Government's construction gives to carriers which operated at a small deficit during Federal control an unfair advantage over those which had but a small profit, for some discrimination results from either the petitioner's or the Government's construction. But more discrimination results from petitioner's construction than from the Government's, for the former discriminates against carriers within the same profit-earning class, while the latter causes no discrimination among any carriers within the same class, although it recognizes the difference in treatment which paragraph (f) compels between carriers which operated more than a year and those which operated less than a year of the test period. But it was within the right of Congress to define the class of carriers entitled to benefits under the section, even though some difference in treatment resulted.

3. The authoritative legislative history of Section 204 and similar provisions relating to Federal control and its termination do not support the view that Congress intended, by that section, to compensate all carriers regardless of whether they operated at a deficit or at a profit during Federal control. Speeches of individual members of Congress may not be used in construing the statute. *Omaha Street Ry.* v. *Int. Comm. Comm.*, 230 U.S. 324, 333; *United States* v. *Missouri Pacific R.R. Co.*, 278 U.S. 269. That Congress did not intend to treat all car-

riers alike in the matter of compensation during and as a result of Federal control is clear from the provisions of the statutes which it enacted.

II

The courts below were not bound by the Commission's interpretation, and they had jurisdiction to construe the statute and determine whether the payment to petitioner was lawful and within the Commission's authority. This power has been exercised by this Court in a long line of familiar decisions sustaining the right of the Government to recover an unauthorized payment: *Wisconsin Central Railroad Co.* v. *United States,* 164 U.S. 190; *Grand Trunk Western Ry. Co.* v. *United States,* 252 U.S. 112; *United States* v. *Burchard,* 125 U.S. 176. Jurisdiction to determine whether Section 204 included carriers of petitioner's class was either in the courts or in the Commission, and if not in the courts, then the Commission's power to reconsider and revoke its first action must be sustained. But under this Court's decision in *Crowell* v. *Benson,* 285 U.S. 22, the courts below clearly had jurisdiction.

III

Recovery may not be denied on the ground that petitioner accepted the payment in good faith and has since disbursed the money. If the statute conferred no right to the payment, then petitioner acquired none by the Commission's misconstruction, and it is liable under the principle announced by

this Court in *Wisconsin Central Railroad Co.* v. *United States, supra,* at p. 212, that "parties receiving moneys illegally paid by a public officer are liable *ex aequo et bono* to refund them." Nor does the claim that the payment was a "compromise" prevent recovery, for the Commission had no authority to "trade" or "compromise" with respect to petitioner's claim.

ARGUMENT

I

THE COURTS BELOW AND THE COMMISSION IN ITS FIRST RULING AND LAST DECISION WERE RIGHT IN HOLDING THAT SINCE PETITIONER MADE A PROFIT, IT WAS NOT ENTITLED TO A PAYMENT UNDER SECTION 204

By Section 204 Congress provided for payments to carriers which had sustained deficits in their railway operating incomes while operating their own lines during Federal control. The carriers affected were principally short lines, like petitioner's, technical control of which the President had assumed by proclamation at the beginning of the Federal control period, but which had been relinquished after a few months. Payments under that section, therefore, were not "in any sense just compensation for the taking of property", but were provided as "partial redress" for "consequential losses" which Congress presumed that those carriers sustained as a result of Federal control of railroads with which they connected. *Continental Tie & L. Co.* v. *United States,* 286 U.S. 290. Such payments were based upon "equitable and moral

considerations", and not upon vested rights. See *Work* v. *Rives*, 267 U.S. 175, 181. Just compensation for the "taking" of actual possession and control of the carriers' property before relinquishment had already been provided in Federal Control Act (40 Stat. 451).

Payments under Section 204 were limited to carriers which sustained deficits in net "railway operating income." That phrase was used in its literal sense to distinguish other kinds of income.

Paragraph (a) of the Section described and defined the carriers entitled to payments thereunder. The definitive language of that paragraph stated three prerequisites, all of which a carrier had to meet in order to establish any right to payment. These were (1) prior engagement in general transportation, and (2) connection or competition with a carrier under Federal control, and (3) a "deficit in its railway operating income" while operating its line during Federal control. Petitioner admittedly, for the purposes of this suit, met the first two requirements, and this controversy centers upon the question whether, having privately operated its line at a profit of $239,525.13 during the control period, it met the third. Whether it did, depends upon the meaning of the term "deficit in its railway operating income" used in that section.

The courts below and the Commission, in its first ruling and its last decision, held that the term meant an actual loss, that is, an excess of operating

expenses over operating revenues, and that the section authorized payments only to those carriers which the Commission found in its first or preliminary step to have incurred such actual loss during the whole period that they operated their lines within the control period. In other words, they held that if the Commission's preliminary examination showed that a particular carrier sustained a loss while privately operating its line during the control period, that carrier was then entitled to a payment in whatever amount resulted from computations to be made by the Commission in the manner prescribed in paragraphs (b) to (f), inclusive; but that if such preliminary examination showed that the carrier made a profit from such private operation, then it was entitled to nothing under the section, and the Commission was not required to proceed with the second step of making computations.

Petitioner contends that Section 204 provides for payment not only of those carriers whose private operation during Federal control resulted in a loss, but also to those whose operation was at a profit during the control period, though a diminished profit for that period as compared with their profit during the test period. It claims in this suit $487,116.21, by which amount its profit during the test period exceeded its profit during Federal control.

Petitioner argues that this construction of the section is compelled (1) by the correct definition of

the word "deficit", (2) to avoid discrimination between carriers which earned small profits and those which operated at small deficits during the control period, and (3) by congressional policy, as disclosed in the legislative history of Section 204 and other provisions, to provide reimbursement of all carriers to the full extent of any diminution in their incomes during the control period as compared with the test period, regardless of the fact that some were under Federal control and some were not.

We think the Circuit Court of Appeals was right in rejecting these views, and in holding that Section 204 provided for payment only of those carriers which sustained an actual loss while operating their own lines during Federal control.

1. THE DECISIONS BELOW ACCORD TO THE TERM "DEFICIT" ITS NORMAL AND ACCEPTED MEANING AND ARE IN HARMONY WITH THIS COURT'S DECISION IN CONTINENTAL TIE & L. CO. v. UNITED STATES, SUPRA

"Deficit" is essentially an accounting term which is universally accepted to mean that the earnings from a business during a stated period are less than the costs incurred. The courts below so construed it, and petitioner itself concedes that this is its normal and accepted meaning, for its brief states at p. 22 that "if the word 'deficits' in this title is construed in the technical accounting sense, the title would not be descriptive of the subject matter."

But Congress undoubtedly used the term in Section 204 in its technical accounting sense, for it was

there used to describe or refer to the financial condition of the defined carriers as shown by their books or accounts. In other words, it was only by an accounting examination and a balancing of the carriers' expenses against their revenues that it could be determined whether a carrier had a deficit. It is only in its accounting sense, therefore, that the term "deficit" would have any application to the subject matter.

Petitioner's contention that the term "deficit" as used in section 204 includes not only an actual loss but also a mere diminution in control period return as compared with test period return does not rest upon doubt or ambiguity with respect to the meaning of the term itself, as used either in the definitive provisions of paragraph (a) or in subsequent paragraphs, but upon the fact that the section requires the Commission, in computing the amount payable to a carrier which sustained a "deficit", to make monthly comparisons of its control period returns with its test period returns. The contention in reality is that a carrier's right to a payment is not to be tested by the condition stated in the definitive provisions of paragraph (a), namely, that it must have operated at a deficit, but wholly by the fact that its operating income was less during the control period than in the test period. The contention ignores the distinction between the provision regarding the *right* to payment and the subsequent provisions regarding the *measure* of payment.

This view also ignores and renders entirely meaningless the term "deficit in its railway operating income", for, if a mere diminution of income between the two periods is the criterion of a carrier's right to payment, then the definitive use of the term in paragraph (a) is, as stated by the District Court (R. 14), "wholly unnecessary and superfluous", for Congress needed only to omit the term in paragraph (a) and carriers having mere diminished returns would clearly be entitled to payment.

No confusion arises if the term "deficit" is given its normal and accepted meaning wherever used in the several paragraphs of Section 204. It is used thirteen times in the entire section. It first appears in paragraph (a), and the remaining twelve times in paragraphs (b) to (f), inclusive, which set forth the method of computing the amount payable to the carriers already defined in paragraph (a). Each time the term appears in paragraphs (b) to (f), it is necessarily used in its accounting sense, that is to mean an excess of operating expenses over operating revenues. If the term is not given its normal meaning in those paragraphs, it is obvious that the computations therein required could not be made, for the monthly comparisons of control period returns with test period returns necessarily mean nothing more than a comparison of the financial results, in terms of the relation between revenues and expenses, during the two periods. For example, paragraph (c) requires the Commission, as the first step to be taken

in making the computations, to ascertain for every month during which a particular carrier operated in the test period, the existence of its deficit in the literal sense for both periods, and the result of this ascertainment is the foundation of the comparison required to arrive at the amount payable. Clearly, the word "deficit" is used in its literal sense in paragraph (f), and no other contention is made by either party in this case. The use of the expression "as a whole" in both paragraphs (a) and (f) further indicates that the test of a carrier's right to payment is to be determined by ascertaining the financial results of the *whole* period of private operation and not by making monthly comparisons.

The Commission said (99 I.C.C. 727–8):

> * * * we are doubtful about the propriety of giving the term "deficit" a meaning in connection with certain provisions of the section which differs materially from the meaning attributed to that term in connection with other provisions of that section. It will be seen that in paragraph (a), which is the jurisdictional paragraph of the section, the term "deficit" is used only once, and then simply for the purpose of describing the carriers to be covered by the section. This indicates that in determining the question of jurisdiction the term cannot be applied in one way in one case and in a different way in another case, and since the term "deficit", used in the latter part of paragraph (f) of the sec-

> tion, must be confined to what is often referred to as a red-ink balance, that is, a case where the carrier's operating revenues are less than its operating expenses, a like meaning should be given to the term as used in other portions of the section.

The Commission also pointed out that the construction urged by petitioner is contrary to that which it had accorded the word "deficit" as used in Section 209, and in making certain computations under paragraph (b) of Section 204. It states (99 I.C.C. 728):

> In administering the provisions of section 209, commonly called the guaranty section of the transportation act, we construe the term "deficit" which appears in paragraph (3) of subdivision (c) and also in subdivision (i) of that section as meaning the excess of operating expenses over operating revenues, and this is the meaning customarily attributed to that term in railroad parlance. A pertinent portion of subdivision (i) reads:
>
> "If for the guaranty period as a whole the American Railway Express Company does not have a deficit in operating income, it shall forthwith pay the amount of its operating income for such period into the Treasury of the United States."
>
> This shows that Congress used the term "deficit" to distinguish a case where operating expenses exceed operating revenues from a case where operating revenues exceed operating expenses.

> In computing, under section 204, railway operating income, or any deficit therein, we are required by paragraph (b) of the section to include in the computation certain taxes and debits and credits arising from equipment rents and joint-facility rents, as provided in section 209 and in section 1 of the Federal Control Act of March 21, 1918, and such computations are intended to be included in the expressions "excess of operating expenses over operating revenues" and "excess of operating revenues over operating expenses", as used by us in this report.

The error in interpreting the word "deficit", not upon the face of paragraph (a) where it is used with reference to the *right* to payment, but in the light of subsequent paragraphs which provide for the *measurement* of payments was pointed out by the Circuit Court of Appeals (R. 89) thus:

> It seems to be admitted that the terms of subdivision (a) of Section 204, taken alone, entitles a carrier to compensation only when it operated at a loss during the control period. It is argued, however, that this construction is affected by the provisions of subdivisions (c), (d), (e), and (f), which prescribe the method by which the deficit is to be ascertained. This argument is without force when it is considered that subdivision (a) explicitly defines the carrier as to whose income the subsequent provisions are to be applied; the latter provisions are necessarily subordinate to the class definition contained in subdivision (a).

As explained by that court, the several paragraphs of the section, read together, operate and apply consistently and logically (R. 90):

> The construction to be given to the section as a whole seems not to be doubtful. The carrier, under subdivision (a), first determines whether it has suffered a loss in its operating income as a whole, for the period of Federal control and while it was not under Federal control. If it has suffered such a loss, then the amount of its reimbursement is to be worked out by means of the calculations required to be made under (c), (d), (e), and (f). If it has not suffered such a loss, it has no right to reimbursement. This construction appears to be in harmony with the purpose of Congress.

We think the decision of the Circuit Court of Appeals is correct and that it is entirely harmonious with the decision of this Court in *Continental Tie & L. Co.* v. *United States, supra,* wherein it was said, at p. 294, concerning short lines privately operated during Federal control that:

> Congress, nevertheless, realized that federal operation had caused them consequential losses, at least partial redress for which was the purpose of the section where *actual deficits* in income had resulted. (Italics ours.)

There is not, as claimed by petitioner, a conflict between this Court's decision in that case and the decisions below, for the point decided in that case was that money received by a carrier pursuant to

Section 204 was income taxable for the year 1920, and not a tax-free gift within the meaning of the Revenue Act of 1918. The statement by the Court that Section 204 " directed the Commission to compare the results " of private operation during Federal control with those of the test period, and if less favorable in the former, " to award an amount calculated as prescribed by the section ", does no more than paraphrase the language of the section itself.

Nor is the decision below in conflict with the decision in *Cripple Creek & Colorado Springs* v. *Interstate Commerce Commission,* 11 F. (2d) 554 (certiorari denied, 273 U.S. 706). In that case the court merely refused a writ of mandamus to compel the Commission to treat certain carriers as a " combined system of transportation " in considering a claim under Section 204.

2. MORE DISCRIMINATION RESULTS FROM PETITIONER'S CONSTRUCTION THAN FROM THE GOVERNMENT'S

The argument (Br. 39) that the Government's construction gives to carriers which operated at a small deficit during Federal control an unfair advantage over those which had but a small profit, is futile. Both the Government's and the petitioner's construction results in disadvantage to some carriers. On this point the Commission aptly said (99 I.C.C. 728):

> It is true that if the term "deficit", wherever it appears in the section, is construed

as meaning only a red-ink balance, as aforesaid, some discriminations may result in connection with the period of Federal control, between carriers who had small net operating incomes on the one hand and those whose operating revenues were less than their operating expenses on the other, but it is also true that such a construction will lessen to some extent discriminations, brought about by our ruling of February 9, between the carriers covered by the latter portion of paragraph (f) and carriers who enjoyed net operating incomes during the period of Federal control.

Petitioner's own theory results in a discrimination between carriers within the diminished-income class. Thus one such carrier operating for a year and a day within the test period would receive payment, but a similar carrier operating for a day less than a year would receive no payment, because it is excluded by the terms of paragraph (f). But, under the deficit theory of the Government, all carriers within the deficit class will receive some payment irrespective of whether they operated a year and a day or for less than a year of the test period. For example, under petitioner's theory, a road which operated for a year and one day during the test period, and which made a profit of $1.00 during Federal control, and a larger profit during the test period, would be reimbursed on the basis of its full test period income, whereas, with the same Federal control profit the same road would get nothing if

it operated for one day less than a year during the test period. For the amount of reimbursement to carriers which operated for less than a year during the test period is expressly limited by paragraph (f) to the amount of their actual deficit or loss.

The Government's theory, while recognizing the distinction created by paragraph (f) between roads that operated a year or more and those that operated less than a year of the test period, nevertheless, results in no discrimination among roads in the same financial class or condition. Because, although the road which operated a year and a day of the test period and had a deficit of $1.00 during Federal control would have the benefit of the greater compensation resulting from test period comparisons while the road which operated for a day less than a year of the test period and had a control period deficit of $1.00 would only get its deficit, both of these roads, being in the same "deficit" class, would be reimbursed to some extent.

The Government contends that the statute is clear. If this be so, resultant discrimination is immaterial because, as was stated by the Circuit Court of Appeals (R. 91), it is within "the right of Congress to define the class of carrier entitled to benefits." But, if it be urged that the statute is not clear and that the less discriminatory meaning should be given to the statute because Congress is to be presumed to have intended the more reasonable and fair result, this weighs in the Government's favor and not in favor of petitioner, because,

as above demonstrated, there is less discrimination under the Government's theory than under the petitioner's.

The classification for which the Government contends is both sensible and fair. As pointed out above, the Government was not discharging an obligation for the "taking" of property, but was, out of an abundance of solicitude, voluntarily extending aid. It is a fair presumption that Congress felt that its purpose would be served if it drew the line between carriers which made a profit and those which operated at a loss, and that sufficient had been done when it aided only those which sustained a loss. It is immaterial that different treatment is accorded a carrier which made a profit of $1.00 and one which lost $1.00—that is characteristic of all classifications.

The reasonableness of this was apparent to both the lower courts and to the Commission. The Commission observed, in *Deficit Status of Bingham & Garfield Ry. Co.*, 99 I.C.C. 727, that applicants such as petitioner were—

> carriers whose net railway operating incomes for the portions of the period of Federal control during which their lines were operated privately were so large that . . . they should be regarded by the carriers' stockholders as very satisfactory, and (the Commission found) it difficult to believe that Congress intended to enact a law which would enable the latter class of car-

riers to withdraw sums of money from the Treasury of the United States and thus augment the comparatively large returns they have already received.

3. THE AUTHORITATIVE LEGISLATIVE HISTORY OF SECTION 204 DOES NOT SUPPORT THE VIEW THAT CONGRESS INTENDED TO COMPENSATE NOT ONLY CARRIERS WHICH HAD DEFICITS BUT ALSO THOSE WHICH HAD MERELY A DIMINISHED INCOME DURING FEDERAL CONTROL

To support its argument (Br. 26–39) that the legislative history of Section 204 compels its construction of "deficit", petitioner relies principally upon speeches and discussions by individual members of Congress on the floor of the Senate and the House. Extracts from these speeches, which discuss not only Section 204 but the guaranty provision of Section 209 and other sections of the bill under consideration, are set forth at pages 33–93 of the appendix to petitioner's brief. These speeches show that there was not only much disagreement among members with respect to the treatment which should be accorded the carriers, but also confusion and misunderstanding of the various provisions of the proposed bill. We understand that, probably because they reflect not the final purpose of the legislative body as a whole but merely the views of individual members, speeches made in course of debate on legislation are not to be used in construing a statute, *Omaha Street Ry.* v. *Int. Com. Comm.*, 230 U. S. 324, 333, and that the authoritative history of a statute consists of the

Committee report and statements by those actually in charge of the bill, *United States* v. *Missouri Pacific R.R. Co.*, 278 U.S. 269.

That Congress did not intend payments to carriers which had merely a diminished income during the control period as compared with the test period, but intended payment only of those which had an actual loss during Federal control, is clearly indicated in the several statutory enactments relating to Federal control and its termination. In the exercise of his power to take possession and control of railroads for purposes of the War (39 Stat. 645) the President, by blanket proclamation, announced on December 28, 1917, that he had taken possession and control of "each and every system of transportation" engaged in general transportation. On March 21, 1918, Congress enacted the Feneral Control Act (40 Stat. 451), Section 1 of which recites that the President had taken possession and control of "certain railroads." Section 14 of that Act expressly authorized the President to relinquish, prior to July 1, 1918, control of all, or any part, of any railroad deemed not needful or desirable. The last sentence of Section 14 declares that "no right to compensation shall accrue to such owners from and after the date of relinquishment for the property so relinquished." Petitioner argues that the relinquishment of a railroad by the President pursuant to Section 14 did not remove such road from

Federal control because Section 1 of the same Act provided that:

> every railroad engaged in general transportation which theretofore competed for traffic, or connected with a railroad of which the President had taken possession, shall be held and considered as within "federal control" as herein defined, and necessary for the prosecution of the War, and shall be entitled to the benefit of all the provisions *of this Act.* (Italics ours.)

But the apparent conflict between the two provisions does not aid petitioner's claim, for the benefits of the Federal Control Act are to be found in its provisions, and, so far as compensation is concerned, such benefits are limited to "just compensation" during the time the road was actually under Federal control; whereas, petitioner's claim here is for a payment under the Transportation Act, 1920, after control of its road was relinquished.

The suggestion (Br. 35–39) that because in Section 209 Congress guaranteed to all carriers, regardless of whether they were under Federal control or operated privately during the control period, a minimum income equivalent to their returns during the test period, it must also have intended by section 204 to pay all carriers which suffered a diminished income in the control period as compared with the test period irrespective of whether they sustained an actual loss during the control period, as a whole and alone, is not persuasive be-

cause it overlooks the obvious difference between the two sections. In Section 240, Congress provided for "partial redress" for "consequential losses" resulting to carriers privately operated during the period of Federal control, *Continental Tie & L. Co.* v. *United States, supra.* That period ended with the enactment of Section 204, and the results of such past operations were already fairly known, or could be closely estimated. Reimbursements under that section were outright contributions from the Government, based not upon vested rights but upon moral and equitable considerations, and nothing was asked or exacted by the Government in exchange for such payments. Under that section the Government could collect nothing from any carrier. But, in the enactment of Section 209, Congress was looking to the future and to the interest, not only of the carriers but the general public as well, in the stabilization of the financial condition and prospects of carriers generally constituting the nation's transportation system as a whole. In consideration of the guaranty provided by that section, Congress, in paragraph (d) thereof, exacted from the carriers any railway operating income realized by them in excess of the minimum guaranteed, and provided that such excess should be paid forthwith into the Treasury of the United States. Moreover, the guaranty benefits of that section were not available to any carrier which did not on or before March 15, 1920, file its written acceptance thereof, which implied an undertaking

to continue operating its line for the public benefit and convenience, as well as its own, during the entire guaranty period, *Texas & Pacific Ry. Co.* v. *United States,* 286 U.S. 285. There was no such exchange or trading of benefits, either public or private, or implied undertaking in the enactment of Section 204.

We perceive nothing in the legislative history of Section 204, or other provisions of the Transportation Act, to compel the conclusion that by that section Congress intended to compensate all carriers which were privately operated during the Federal control period, regardless of whether such operation was at a deficit or a profit. Certainly the legislative history is insufficient to justify attributing to the term "deficit in its railway operating income" a meaning which so far departs from the sense in which it is customarily used and universally accepted as to give it almost the opposite of its accepted meaning.

II

THE COURTS WERE NOT BOUND BY THE COMMISSION'S INTERPRETATION; THEY HAD JURISDICTION TO CONSTRUE THE STATUTE AND DETERMINE WHETHER THE PAYMENT TO PETITIONER WAS WITHIN THE COMMISSION'S AUTHORITY

It is contended (Br. 44–71) that even though the Commission misconstrued the statute in certifying payment to petitioner, its first action is final and conclusive upon both the Commission and the courts; that the Commission had no power to reconsider and reverse its first decision; and that the

courts were without jurisdiction to determine whether the statute included carriers having a mere diminished income as well as those which had an actual loss.

Petitioner would thus absolutely preclude the Government from recovering any payment under section 204, regardless of whether the recipient was within the class defined by the section or whether the Commission was authorized to certify the payment. The contention ignores a long line of familiar decisions of this Court sustaining the right of the Government to recover money disbursed by its agents upon their misconstruction of the law under which they assumed to act. *Wisconsin Central Railroad Co.* v. *United States,* 164 U.S. 190, 210; *Grand Trunk Western Ry. Co.* v. *United States,* 252 U.S. 112; *United States* v. *Burchard,* 125 U.S. 176; *Burnet* v. *Porter,* 283 U.S. 230. These decisions foreclose all questions with respect to the right of the Government to recover a payment resulting from an erroneous conclusion by its agent as to the legal effect of the particular statute under, or in reference to which, he is proceeding; and, upon authority of them, the Circuit Court of Appeals correctly held (R. 92):

> The United States may demand repayment of money paid out by its officers or agents where no authority of law exists for such payment. Persons so receiving public funds are charged with knowledge that they have taken that to which they have not the

right, and are bound, upon demand, to return it.

Manifestly, the power to construe the statute and determine whether it authorized the payment to petitioner was either in the courts or in the Commission. We, think, and will presently demonstrate, that the court clearly had jurisdiction, and that the question whether the Commission had power to reverse its first decision need not be decided. But, if we should be wrong in that view, then we contend that the Commission was empowered to reconsider and correct its first decision; and that if, as petitioner argues, the Commission had exclusive power to construe the statute, the courts must be bound by its final decision.[3] For,

[3] The Commission has consistently exercised the power to reopen and correct its decisions with respect to claims under sections 204 and 209. See *Deficit Status of Boyne City, Gaylord, and Alpena*, 76 I.C.C. 731, and 79 I.C.C. 749; *Deficit Settlement With B. A. & P. Ry.*, 117 I.C.C. 780; *Guaranty Settlement With Ray & Gila Valley R. R. Co.*, 76 I.C.C. 557, and 138 I.C.C. 59; *Guaranty Settlement With B. R. & P. Ry.*, 71 I.C.C. 21, and 71 I.C.C. 262; *Guaranty Settlement With Great Northern Ry. Co.*, 99 I.C.C. 231, and 111 I.C.C. 318; *Guaranty Settlement With Northern Pacific Ry. Co.*, 99 I.C.C. 247, and 111 I.C.C. 340. The power thus exercised is apparently within the Commission's discretion, *Empire & S. E. Ry Co.* v. *Interstate Commerce Commission*, 45 F. (2d) 293 (App. D. C.). And the existence of it is not inconsistent with this Court's decision in *United States* v. *Great Northern Ry. Co.*, 287 U.S. 144, holding that certificates issued by the Commission for "partial payments" under the emergency provisions of section 212 were final, because the legislative history of that section showed emphatically that Congress so intended.

if the Commission's jurisdiction was exhausted by its first and unauthorized action, and if that action also was conclusive upon the courts, then the Government is left in the anomalous position of possessing the right, sustained by this Court in the decisions last cited, to recover an unauthorized payment but with an absolute denial of its right to recover for lack of a forum.

But we think the courts below were clearly correct in holding that they had jurisdiction to construe the statute and determine whether the payment was authorized. On this point the Circuit Court of Appeals held (R. 91–92):

> It has been clearly settled that the Courts have full right, when appealed to, to determine by independent hearing, whether agencies of the government to which have been committed duties involving the exercise of administrative functions, or powers of a judicial nature, have exercised their powers with respect to the particular persons or subject matter designated by Congress. If the power is lacking the act is void.

The determination of facts with respect to claims of carriers within the purview of section 204 was the Commission's "ministerial" function. *Continental Tie & L. Co.* v. *United States, supra,* p. 295. But the question whether a particular carrier was within the purview of the section is purely judicial, for that question is fundamental or "jurisdictional." The distinction between ministerial or administrative functions and those which are

purely judicial is clearly defined and explained by this Court in *Crowell* v. *Benson,* 285 U.S. 22, p. 54 *et seq.,* wherein it was held that whether a person claiming compensation under the Longshoremen's and Harbor Workers' Compensation Act was "employed" as that term was used in the Act, was a judicial question, which was within the power and province of the Court to determine. In that case the Court upheld its power to determine the *fact* of employment because the existence of that fact was "indispensable to the application of the statute", while here it is called upon merely to construe the term "deficit", and not to determine any fact, for the correctness of the Commission's finding that petitioner operated its line at a profit during Federal control is admitted. The case at bar does not fall within the class of cases which the opinion in that case distinguished (pp. 57–58) from the decision therein, for in this case the Commission was not exercising its power as an agency of Congress to regulate commerce. *Great Northern Ry. Co.* v. *United States,* 277 U.S. 172, 180.

Section 204 is silent with respect to finality or court review of the Commission's action. The decision of the Circuit Court of Appeals, therefore, is not in conflict with this Court's decision in *Work* v. *Rives,* 267 U.S. 175, or other decisions construing the Dent Act prior to amendment, because that Act then expressly declared that the decision of the Secretary of the Interior was "conclusive and final." The subsequent amendment of the Act,

authorizing court review of final decisions of the Secretary upon questions of law, does not render applicable the decision of this Court, after the amendment, in *Wilbur* v. *United States,* 284 U.S. 231, for then the right of the Court to review questions of law was expressly conferred. Nor is there conflict between the decision below and the decision in *Great Northern Ry. Co.* v. *United States,* 277 U.S. 172. There this Court held that the special remedy provided by Urgent Deficiencies Act, 38 Stat. 219 (U.S.C. Title 28, sec. 41 (28); secs. 43–47, inclusive) for judicial review of orders issued by the Commission in the exercise of its statutory power to regulate commerce, was not available in a suit attempting to enjoin and annul a certificate issued by it under sec. 209, Transportation Act, 1920. And there is no conflict with the decision in *United States* v. *Great Northern Ry.,* 287 U.S. 144, cited by petitioner, where this Court laid down three grounds differentiating that situation from the case at bar: First, this Court said, "mistake there was none but merely a revision of judgment in respect of matters of opinion", whereas in the case at bar there was a mistake in interpretation of the statute. Secondly, the Court pointed out that "the officials of the Government knew precisely what they were doing, and kept well within the statute defining their authority. They did not act illegally * * *." In the case at bar the very point is whether the Commission in authorizing the payment, here sought to be recovered, was acting in

excess of its authority. Third, in that case the Commission contended that it could revise its discretion and recall payments made, whereas in this case the Commission is not changing its judgment within the field of discretion but has simply come to realize that it had no authority to authorize the payment at all.

The decision of this Court in *United States* v. *Ferreira,* 13 How. 39, cited Br. 50, 57, lends no support to petitioner's argument that the Commission's first action is final. That was an attempt to "appeal" to a court from an "award" rendered by a judge acting under a statute which expressly constituted him a special tribunal for the purpose merely of making awards upon claims, and this Court held that no "appellate" review of the award could be had. Nor does the decision in *United States* v. *Arredondo,* 6 Pet. 691, support the argument with respect to conclusiveness or finality of the Commission's action as presented in the case at bar. On the contrary, the decision clearly supports the Government's contention, for the language upon which petitioner relies (Br. 60) expressly states that only questions concerning "power in the officer and fraud in the party" can be raised in the courts upon a determination by a specially designated public officer or tribunal. The fundamental question in the case at bar is whether there was "power" in the Commission to certify a payment to the petitioner. If the statute is to be construed as the Government contends, then the Com-

mission was without such power. The decision in *United States* v. *Wildcat*, 244 U.S. 111, is inapposite, for the question here is not whether the Commission made a mistake with respect to a matter within the purview of its authority, but whether the statute authorized any payment to the class of carrier which petitioner admittedly was. The cases cited at pp. 65 and 66 of petitioner's brief do not touch the question of finality or conclusiveness presented in this case. They hold merely that neither mandamus nor certiorari will lie to correct decisions by the Commission upon claims within the purview of its authority under sections 204 and 209.

Nor is there merit in the suggestion (Br. 69) that the Commission's first action must be regarded as final and conclusive upon the courts merely because two of its members who participated in that decision had been superseded by two members when its second decision was rendered. The suggestion misconceives the fact that the authority was delegated to "the Commission" as a tribunal composed of several members and not to the several members as individuals.

III

RECOVERY MAY NOT BE DENIED ON THE GROUND (1) THAT PETITIONER IS ENTITLED TO RETAIN THE MONEY EX AEQUO ET BONO, OR (2) THAT THE PAYMENT WAS A COMPROMISE

It is asserted (Br. 69) that because petitioner accepted the payment in good faith and has since

changed its *status*, the money *ex aequo et bono* belongs to it, and not to the Government. The claim is clearly erroneous, for the principle is unavailing to one who seeks to escape the refunding of an unauthorized payment of public funds. If petitioner has any right to the money it must be spelled out of the statute itself. *Continental Tie & L. Co.* v. *United States, supra,* p. 295. If the statute gave it no right, then it has none, for the Commission's misconstruction could not confer what the statute did not grant, and the petitioner is liable under the principle announced in *Wisconsin Central Railroad Co.* v. *United States, supra,* 164 U.S., at p. 212, that:

> * * * parties receiving moneys illegally paid by a public officer are liable *ex aequo et bono* to refund them.

The suggestion (Br. 80–87) that the payment was a "compromise" of petitioner's claim, and cannot, therefore, be set aside by this suit, is based upon a misconception of the authority delegated to the Commission. The basis of the suggestion apparently is the fact that at the Commission's request petitioner signed a statement that it accepted the payment "in settlement of all claims against the Government under said section 204" (R. 21–23). The Circuit Court of Appeals declined to consider the payment as a compromise because it had already concluded that petitioner was not a "carrier" as defined in the section, and, therefore, "was not entitled to any amount under the facts as ad-

mitted." (R. 92.) But it is clear that the payment may not be treated as a compromise, for section 204 simply directs the Commission to ascertain, in the manner therein prescribed, the amount payable to the several carriers entitled to reimbursement, and confers no authority to "trade" or "compromise" with carriers. Nor does the fact that petitioner signed a statement, at the Commission's suggestion, that it accepted the payment in settlement of all claims under section 204, enlarge the authority conferred, for the Commission could not legislate.

CONCLUSION

The judgment of the Circuit Court of Appeals should be affirmed.

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OCTOBER 1933.

APPENDIX

TRANSPORTATION ACT, 1920, C. 91, 41 STAT. 456, 460, U.S.C., TITLE 49, SEC. 73, AS AMENDED MARCH 4, 1927, C. 510, 44 STAT. 1446, U.S.C., SUP. VI, TITLE 49, SEC. 22

REIMBURSEMENT OF DEFICITS DURING FEDERAL CONTROL

SEC. 204. (a) When used in this section—

The term "carrier" means a carrier by railroad which, during any part of the period of Federal control, engaged as a common carrier in general transportation, and competed for traffic, or connected, with a railroad under Federal control, and which sustained a deficit in its railway operating income for that portion (as a whole) of the period of Federal control during which it operated its own railroad or system of transportation; but does not include any street or interurban electric railway which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic or sale of power, heat, and light, or both; and

The term "test period" means the three years ending June 30, 1917.

(b) For the purposes of this section—

Railway operating income or any deficit therein for the period of Federal control shall be computed in a manner similar to that provided in section 209 with respect to such income or deficit for the guaranty period; and

Railway operating income or any deficit therein for the test period shall be computed in the manner provided in section 1 of the Federal Control Act.

(c) As soon as practicable after March 1, 1920, the Commission shall ascertain for every carrier, for every month of the period of Federal control during which its railroad or system of transportation was not under Federal operation, its deficit in railway operating income, if any, and its railway operating income, if any (hereinafter called "Federal control return"), and the average of its deficit in railway operating income, if any, and of its railway operating income, if any, for the three corresponding months of the test period taken together (hereinafter called the "test period return"): *Provided,* That "test period return," in the case of a carrier which operated its railroad or system of transportation for at least one year during, but not for the whole of, the test period, means its railway operating income, or the deficit therein, for the corresponding month during the test period, or the average thereof for the corresponding months during the test period taken together, during which the carrier operated its railroad or system of transportation.

(d) For every month of the period of Federal control during which the railroad or system of transportation of the carrier was not under Federal operation, the Commission shall then ascertain (1) the difference between its Federal control return, if a deficit, and its test period return, if a smaller deficit, or (2) the difference between its test period return, if an income, and its Federal control return, if a smaller income, or (3) the sum of its Federal control return, if a deficit, plus its test period return, if an income. The sum of such amounts shall be credited to the carrier.

(e) For every such month the Commission shall then ascertain (1) the difference between the carrier's Federal control return, if an income, and its test period return, if a smaller income, or (2) the difference between its test period return, if a deficit, and its Federal control return, if a smaller deficit, or (3) the sum of its Federal control return, if an income, plus its test period return, if a deficit. The sum of such amounts shall be credited to the United States.

(f) If the sum of the amounts so credited to the carrier under subdivision (d) exceeds the sum of the amounts so credited to the United States under subdivision (e), the difference shall be payable to the carrier. In the case of a carrier which operated its railroad or system of transportation for less than a year during, or for none of, the test period, the foregoing computation shall not be used, but there shall be payable to such carrier its deficit in railway operating income for that portion (as a whole) of the period of Federal control during which it operated its own railroad or system of transportation.

(g) The Commission shall promptly certify to the Secretary of the Treasury the several amounts payable to carriers under paragraph (f). The Secretary of the Treasury is hereby authorized and directed thereupon to draw warrants in favor of each such carrier upon the Treasury of the United States for the amount shown in such certificate as payable thereto. An amount sufficient to pay such warrants is hereby appropriated out of any money in the Treasury not otherwise appropriated.

(h) This section shall not be applicable to any carrier which has not, on or before the expiration of sixty days after this subdivision takes effect, filed with the commission a statement, compiled substantially in the manner prescribed in this section, showing the amount claimed to be due such carrier under this section.

* * * * *

GUARANTY TO CARRIERS AFTER TERMINATION OF FEDERAL CONTROL

SEC. 209. (a) When used in this section—

The term "carrier" means (1) a carrier by railroad or partly by railroad and partly by water, whose railroad or system of transportation is under Federal control at the time Federal control terminates, or which has heretofore engaged as a common carrier in general transportation and competed for traffic, or connected, with a railroad at any time under Federal control; and (2) a sleeping car company whose system of transportation is under Federal control at the time Federal control terminates; but does not include a street or interurban electric railway not under Federal control at the time Federal control terminates, which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic or sale of power, heat, and light, or both;

The term "guaranty period" means the six months beginning March 1, 1920.

The term "test period" means the three years ending June 30, 1917; and

The term "railway operating income" and other references to accounts of carriers by railroad shall, in the case of a sleeping-car company, be construed as indicating the appropriate corresponding ac-

counts in the accounting system prescribed by the Commission.

(b) This section shall not be applicable to any carrier which does not on or before March 15, 1920, file with the Commission a written statement that it accepts all the provisions of this section.

(c) The United States hereby guarantees—

(1) With respect to any carrier with which a contract (exclusive of so-called "cooperative contracts" or waivers) has been made fixing the amount of just compensation under the Federal Control Act, that the railway operating income of such carrier for the guaranty period as a whole shall not be less than one half the amount named in such contract as annual compensation, or, where the contract fixed a lump sum as compensation for the whole period of Federal operation, that the railway operating income of such carrier for the guaranty period as a whole shall not be less than an amount which shall bear the same proportion to the lump sum so fixed as 6 months bears to the number of months during which such carrier was under Federal operation, including in both cases the increases in such compensation provided for in section 4 of the Federal Control Act;

(2) With respect to any carrier entitled to just compensation under the Federal Control Act, with which such a contract has not been made, that the railway operating income of such carrier for the guaranty period as a whole shall not be less than one half of the annual amount estimated by the President as just compensation for such carrier under the Federal Control Act, including the increases in such compensation provided for in section 4 of the Federal Control Act. If any such

carrier does not accept the President's estimate respecting its just compensation, and if in proceedings under section 3 of the Federal Control Act it is determined that a larger or smaller annual amount is due as just compensation, the guaranty under this paragraph shall be increased or decreased accordingly;

(3) With respect to any carrier, whether or not entitled to just compensation under the Federal Control Act, with which such a contract has not been made, and for which no estimate of just compensation is made by the President, and which for the test period as a whole sustained a deficit in railway operation income, the guaranty shall be a sum equal to (a) the amount by which any deficit in its railway operating income for the guaranty period as a whole exceeds one half of its average annual deficit in railway operating income for the test period, plus (b) an amount equal to one half the annual sum fixed by the President under section 4 of the Federal Control Act;

(4) With respect to any carrier not entitled to just compensation under the Federal Control Act, which for the test period as a whole had an average annual railway operating income, that the railway operating income of such carrier for the guaranty period as a whole shall not be less than one-half the average annual railway operating income of such carrier during the test period.

(d) If for the guaranty period as a whole the railway operating income of any carrier entitled to a guaranty under paragraph (1), (2), or (4) of subdivision (c) is in excess of the minimum railway operating income guaranteed in such paragraph, such carrier shall forthwith pay the amount

of such excess into the Treasury of the United States. If for the guaranty period as a whole the railway operating income of any carrier entitled to a guaranty under paragraph (3) of subdivision (c) is in excess of one-half of the annual sum fixed by the President with respect to such carrier under section 4 of the Federal Control Act, such carrier shall forthwith pay the amount of such excess into the Treasury of the United States. The amounts so paid into the Treasury of the United States shall be added to the funds made available under section 202 for the purposes indicated in such section. Notwithstanding the provisions of this subdivision, any carrier may retain out of any such excess any amount necessary to enable it to pay its fixed charges accruing during the guaranty period.

(e) For the purposes of this section railway operating income, or any deficit therein, for the test period shall be computed in the manner provided for in section 1 of the Federal Control Act.

(f) In computing railway operating income, or any deficit therein, for the guaranty period for the purposes of this section—

(1) Debits and credits arising from the accounts, called in the monthly reports to the Commission, equipment rents and joint facility rents, shall be included, but debits and credits arising from the operation of such street electric passenger railways, including railways commonly called interurbans, as are not under Federal control at the time of termination thereof, shall be excluded;

(2) Proper adjustments shall be made (a) in case any lines which were, during any portion of the period of Federal control, a part of the railroad or system of transportation of the carrier, and

whose railway operating income was included in such income of the carrier for the test period, do not continue to be a part of such railroad or system of transportation during the entire guaranty period, and (b) in case of any lines acquired by, leased to, or consolidated with, the railroad or system of transportation of the carrier at any time since the end of the test period and prior to the expiration of the guaranty period, for which separate operating returns to the Commission are not made in respect to the entire portion of the guaranty period;

(3) There shall not be included in operating expenses, for maintenance of way and structures, or for maintenance of equipment, more than an amount fixed by the Commission. In fixing such amount the Commission shall so far as practicable apply the rule set forth in the proviso in paragraph (a) of section 5 of the "standard contract" between the United States and the carriers (whether or not such contract has been entered into with the carrier whose railway operating income is being computed);

(4) There shall not be included any taxes paid under Title I or II of the Revenue Act of 1917, or such portion of the taxes paid under Title II or III of the Revenue Act of 1918 as by the terms of such Act are to be treated as levied by an Act in amendment of Title I or II of the Revenue Act of 1917; and

(5) The Commission shall require the elimination and restatement of the operating expenses and revenues (other than for maintenance of way and structures, or maintenance of equipment) for the guaranty period, to the extent necessary to correct

and exclude any disproportionate or unreasonable charge to such expenses or revenues for such period, or any charge to such expenses or revenues for such period which under a proper system of accounting is attributable to another period.

(g) The Commission shall, as soon as practicable after the expiration of the guaranty period, ascertain and certify to the Secretary of the Treasury the several amounts necessary to make good the foregoing guaranty to each carrier. The Secretary of the Treasury is hereby authorized and directed thereupon to draw warrants in favor of each such carrier upon the Treasury of the United States, for the amount shown in such certificate as necessary to make good such guaranty. An amount sufficient to pay such warrants is hereby appropriated out of any money in the Treasury not otherwise appropriated.

(h) Upon application of any carrier to the Commission, asking that during the guaranty period there may be advanced to it from time to time such sums, not in excess of the estimated amount necessary to make good the guaranty, as are necessary to enable it to meet its fixed charges and operating expenses, the Commission may certify to the Secretary of the Treasury the amount of, and times at which, such advances, if any, shall be made. The Secretary of the Treasury, on receipt of such certificate, is authorized and directed to make the advances in the amounts and at the times specified in the certificate, upon the execution by the carrier of a contract, secured in such manner as the Secretary may determine, that upon final determination of the amount of the guaranty provided for by this section such carrier will repay to the United States

any amounts which it has received from such advances in excess of the guaranty, with interest at the rate of 6 per centum per annum from the time such excess was paid. There is hereby appropriated, out of any money in the Treasury not otherwise appropriated, a sum sufficient to enable the Secretary of the Treasury to make the advances referred to in this subdivision.

(i) If the American Railway Express Company shall, on or before March 15, 1920, file with the Commission a written statement that it accepts all the provisions of this subdivision, the contract of June 26, 1918, between such company and the Director General of Railroads, as amended and continued by agreement dated November 21, 1918, shall remain in full force and effect during the guaranty period in so far as the same constitutes a guaranty on the part of the United States to such company against a deficit in operating income.

In computing operating income, and any deficit therein, for the guaranty period for the purposes of this subdivision, the Commission shall require the elimination and restatement of the operating expenses and revenues for the guaranty period, to the extent necessary to correct and exclude any disproportionate or unreasonable charge to such expenses or revenues for such period, or any charge to such expenses or revenues for such period which under a proper system of accounting is attributable to another period, and to exclude from operating expenses so much of the charge for payment for express privileges to carriers on whose lines the express traffic is carried as is in excess of 50.25 per centum of gross express revenue.

* * * * *

SEC. 212. [*Added February 26, 1921,* v. 72, 41 Stat. 1145.] (a) In making certifications under section 204 or section 209, the Commission, if not at the time able finally to determine the whole amount due under such section to a carrier or the American Railway Express Company, may make its certificate for any amount definitely ascertained by it to be due, and may thereafter in the same manner make further certificates, until the whole amount due has been certified. The authority of and direction to the Secretary of the Treasury under such sections to draw warrants is hereby made applicable to each such certificate. Warrants drawn pursuant to this section, whether in partial payment or in final payment, shall be paid: (1) If for a payment in respect to reimbursement of a carrier for a deficit during the period of Federal control, out of the appropriation made by section 204; (2) if for a payment in respect to the guaranty to a carrier other than the American Railway Express Company, out of the appropriation made by subdivision (g) of section 209; and (3) if for a payment in respect to the guaranty to the American Railway Express Company, out of the appropriation made by the fifth paragraph of subdivision (i) of section 209.

(b) In ascertaining the several amounts payable under either of such sections, the Commission is authorized, in the case of deferred debits and credits which cannot at the time be definitely determined, to make, whenever in its judgment practicable, a reasonable estimate of the net effect of any such items, and, when agreed to by the carrier or express company, to use such estimate as a definitely ascertained amount in certifying amounts

payable under either of such sections, and such estimates so agreed to shall be prima facie but not conclusive evidence of their correctness in amount in final settlement.

Federal Control Act, as Amended

Section 1 and Section 14 of the Federal Control Act, as amended, c. 25, 40 Stat. 451, provide that:

> Sec. 1. That the President, having in time of war taken over the possession, use, control, and operation (called herein Federal control) of certain railroads and systems of transportation (called herein carriers), is hereby authorized to agree with and to guarantee to any such carrier making operating returns to the Interstate Commerce Commission, that during the period of such Federal control it shall receive as just compensation an annual sum, payable from time to time in reasonable installments, for each year and pro rata for any fractional year of such Federal control, not exceeding a sum equivalent as nearly as may be to its average annual railway operating income for the three years ended June thirtieth, nineteen hundred and seventeen.
>
> That any railway operating income accruing during the period of Federal control in excess of such just compensation shall remain the property of the United States. In the computation of such income, debits and credits arising from the accounts called in the monthly reports to the Interstate Commerce Commission equipment rents and joint-facility rents shall be included, but debits and credits arising from the operation of such street electric passenger railways, including railways commonly called interur-

bans, as are at the time of the agreement not under Federal control, shall be excluded. If any lines were acquired by, leased to, or consolidated with such railroad or system between July first, nineteen hundred and fourteen, and December thirty-first, nineteen hundred and seventeen, both inclusive, and separate operating returns to the Interstate Commerce Commission were not made for such lines after such acquisition, lease, or consolidation, there shall (before the average is computed) be added to the total railway operating income of such railroad or system for the three years ended June thirtieth, nineteen hundred and seventeen, the total railway operating income of the lines so acquired, leased, or consolidated, for the period beginning July first, nineteen hundred and fourteen, and ending on the date of such acquisition, lease, or consolidation, or on December thirty-first, nineteen hundred and seventeen, whichever is the earlier. The average annual railway operating income shall be ascertained by the Interstate Commerce Commission and certified by it to the President. Its certificate shall, for the purpose of such agreement, be taken as conclusive of the amount of such average annual railway operating income.

Every such agreement shall provide that any Federal taxes under the Act of October third, nineteen hundred and seventeen, or Acts in addition thereto or in amendment thereof, commonly called war taxes, assessed for the period of Federal control beginning January first, nineteen hundred and eighteen, or any part of such period, shall be paid by the carrier out of its own funds, or shall be charged against or deducted from the just compensation;

that other taxes assessed under Federal or any other governmental authority for the period of Federal control or any part thereof, either on the property used under such Federal control or on the right to operate as a carrier, or on the revenues or any part thereof derived from operation (not including, however, assessments for public improvements or taxes assessed on property under construction, and chargeable under the classification of the Interstate Commerce Commission to investment in road and equipment), shall be paid out of revenues derived from railway operations while under Federal control; that all taxes assessed under Federal or any other governmental authority for the period prior to January first, nineteen hundred and eighteen, whenever levied or payable, shall be paid by the carrier out of its own funds, or shall be charged against or deducted from the just compensation.

Every such agreement shall also contain adequate and appropriate provisions for the maintenance, repair, renewals, and depreciation of the property, for the creation of any reserves or reserve funds found necessary in connection therewith, and for such accounting and adjustments of charges and payments, both during and at the end of Federal control as may be requisite in order that the property of each carrier may be returned to it in substantially as good repair and in substantially as complete equipment as it was in at the beginning of Federal control, and also that the United States may, by deductions from the just compensations or by other proper means and charges, be reimbursed for the cost of any additions, repairs, renewals, and betterments to such property

not justly chargeable to the United States; in making such accounting and adjustments, due consideration shall be given to the amounts expended or reserved by each carrier for maintenance, repairs, renewals, and depreciation during the three years ended June thirtieth, nineteen hundred and seventeen, to the condition of the property at the beginning and at the end of Federal control and to any other pertinent facts and circumstances.

The President is further authorized in such agreement to make all other reasonable provisions, not inconsistent with the provisions of this Act or of the Act entitled "An Act making appropriations for the support of the Army for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes", approved August twenty-ninth, nineteen hundred and sixteen, that he may deem necessary or proper for such Federal control or for the determination of the mutual rights and obligations of the parties to the agreement arising from or out of such Federal control.

If the President shall find that the condition of any carrier was during all or a substantial portion of the period of three years ended June thirtieth, nineteen hundred and seventeen, because of nonoperation, receivership, or where recent expenditures for additions or improvements or equipment were not fully reflected in the operating railway income of said three years or a substantial portion thereof, or because of any undeveloped or abnormal conditions, so exceptional as to make the basis of earnings hereinabove provided for plainly inequitable as a fair measure of just compensation, then the President may make with the carrier such agreement for such amount

as just compensation as under the circumstances of the particular case he shall find just.

That every railroad not owned, controlled, or operated by another carrier company, and which has heretofore competed for traffic with a railroad or railroads of which the President has taken the possession, use, and control, or which connects with such railroads and is engaged as a common carrier in general transportation, shall be held and considered as within "Federal control," as herein defined, and necessary for the prosecution of the war, and shall be entitled to the benefit of all the provisions of this Act: *Provided, however,* That nothing in this paragraph shall be construed as including any street or interurban electric railway which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic, or sale of power, heat and light, or both.

The agreement shall also provide that the carrier shall accept all the terms and conditions of this Act and any regulation or order made by or through the President under authority of this Act or of that portion of the Act entitled "An Act making appropriations for the support of the Army for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes," approved August twenty-ninth, nineteen hundred and sixteen, which authorizes the President in time of war to take possession, assume control, and utilize systems of transportation.

* * * * *

SEC. 14. That the Federal control of railroads and transportation systems herein and heretofore provided for shall continue for

and during the period of the war and for a reasonable time thereafter, which shall not exceed one year and nine months next following the date of the proclamation by the President of the exchange of rationfications of the treaty of peace: *Provided, however,* That the President may, prior to July first, nineteen hundred and eighteen, relinquish control of all or any part of any railroad or system of transportation, further Federal control of which the President shall deem not needful or desirable; and the President may at any time during the period of Federal control agree with the owners thereof to relinquish all or any part of any railroad or system of transportation. The President may relinquish all railroads and systems of transportation under Federal control at any time he shall deem such action needful or desirable. No right to compensation shall accrue to such owners from and after the date of relinquishment for the property so relinquished.

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